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No. 71-1500

In The

Supreme Court of the United States

WILLIAM CROMER KNOX and CHARLES R. WILSON
a/k/a C. R. WILSON

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, WILLIAM CROMER KNOX and CHARLES R. WILSON, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, in the above-entitled cause rendered March 14, 1972, (Petitioners' Motion for Rehearing in said cause having been denied by the United States Court of Appeals for the Fifth Circuit on April 19, 1972).

I. REPORT OF THE OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, *infra*, page 37, is reported in ____ Fed.2d ____.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The judgment of the United States Court of Appeals for the Fifth Circuit was entered March 14, 1972, Appendix A hereto, *infra*, page 37.

2. The order denying petitioners' motion for rehearing and motion for rehearing *enbanc* was entered on April 19, 1972, Appendix B hereto, *infra*, page 44.

3. The order denying stay of mandate, filed May 2, 1972, Appendix C, *infra*, page 45.

4. The jurisdiction of this court is invoked under 28 U.S.C.A. 1254(1).

III. QUESTIONS PRESENTED

1. Whether Rule Two of the Railroad Commission of the State of Texas is unconstitutional as being in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States insofar as it purports to authorize an entry upon an oil and gas lease without a warrant, conduct tests, and seize property, with the fruits of such search and seizure by state officers being admitted in the trial of the subsequent prosecution of Appellants for mail fraud in Federal Court.

2. Whether appellants were deprived of their constitutional rights under the Fourth and Fourteenth Amendments

to the Constitution of the United States by the failure of the trial court to suppress the fruits of such search and seizure and the subsequent admission of such evidence upon the trial of this cause.

3. Whether or not defendants were denied their rights to a trial by due process of law where: (a) the expert based his opinion on improperly admitted hearsay evidence; and (b) the government failed to prove an essential element of the indictment for mail fraud, to-wit: that Service Pipeline suffered a loss or was defrauded.

4. Whether or not the requested charge of the reasonable hypothesis test of circumstantial evidence was required under the facts of this case.

5. Whether or not the protection of the Fourth Amendment should be extended to protect a private citizen from unreasonable searches and seizures by security agents of a large corporation.

6. Whether the admission of business records under the Federal Business Records Act based only upon the testimony of the custodian of the records (who had no personal knowledge of the correctness of the records and did not prepare the records) violated appellants' right of confrontation under the Sixth Amendment of the Constitution of the United States, and whether expert testimony based upon such records (if the expert's testimony was based upon the same) violated the Federal Hearsay Rule.

IV. CONSTITUTIONAL, STATUTORY, AND REGULATIONS PROVISION INVOLVED

1. Rule Two of the Railroad Commission of the State of Texas is the only regulation involved, and it reads as follows:

"(A) The Commission or its representatives shall have access to come upon any lease or property operated or controlled by a producer or transporter of oil or gas and to inspect any and all leases, properties and wells and all records of said leases, properties and wells. All information obtained by Commission representatives shall be considered official and confidential information and shall be reported only to the Commission. (From Old Rule 31)

"(B) Designated agents of the Commission are authorized to make any tests on any well at any time necessary to conservation regulation, and the owner of such well is hereby directed to do all things that may be required of him by the Commission's agent to make such tests in a proper manner. (From Old Rule 53)."

2. Statutory provisions involved are:

(A) Article 4.13 (Taxation—General) Volume 20a, V.A.T.S. which reads as follows:

"Each and every person appointed by the Commission and holding the certificate of the Commission authorizing such appointee to inspect oil wells, oil leases, pipe lines, railroad cars or tanks shall have the right of free access to such leases, premises, wells, pipe lines, railroad cars, or tanks, and to motor truck tanks, at any and all times for the purpose of inspection with respect to the production and transportation of oil. Any person or owner producing oil in this State who shall by objection, interference, or otherwise prevent any such person so appointed by the Commission from the free right of access to any leases or premises or wells where oil is produced, or who shall in any manner interfere with such representative's examination of any such leases, premises, or wells to ascertain the quantity and time of production of oil, shall be guilty

of a misdemeanor, and upon conviction thereof shall be subject to a fine of not exceeding Five Hundred Dollars ($500) or by imprisonment in the county jail not exceeding six (6) months or by both such fine and imprisonment."

(B) Article 6066a, Section 7, V.A.T.S.:

"In all prosecutions, criminal actions, cases, proceedings or suits involving the enforcement of the provisions of this Act or of any order of the Commission all State Rangers and all agents of the Commission shall have the power and authority to serve any criminal or judicial process, warrant, subpoena, or writ just the same and as fully as any sheriff, constable or peace officer is authorized under existing laws when so directed by the court issuing such process. . . ."

(C) 28 U.S.C. 1732(a):

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. . . ."

3. The constitutional provisions involved in this case

are the Fourth, Sixth, and Fourteenth Amendments to the Constitution of the United States, the pertinent portions of which read as follows:

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..."

Fourteenth Amendment:

"...Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

V. MATERIAL FACTS

By indictment filed August 25, 1970, petitioners were charged with violation of Title 18, United States Code, Sec. 1341 (mail fraud), and conspiracy to violate such Mail Fraud Statute in ten counts (Wilson charged with all ten, and Knox in seven). It is charged that the petitioners devised a scheme to defraud Pan American Petroleum Corporation and Service Pipeline Company (now known as Amoco Pipeline Company) over the period from about August 1, 1964, to about December 31, 1969, whereby they would induce Pan American to pay C. R. Wilson for crude oil allegedly produced from his land and delivered into the pipeline of Service Pipeline Company by falsely represent-

ing the amount of crude oil produced and delivered from such land. Wilson was the owner of the land and producer, and Knox was an employee of Service Pipeline who, along with Wilson, signed most of the run tickets indicating the amount of oil delivered. (App. 7-19). The essence of the indictment is that Pan American paid for oil it did not receive.

The government offered no evidence that Pan American did not receive the oil or was short any oil. Petitioners moved for judgment of acquittal based upon (1) insufficiency of the evidence; (2) absence of sufficient legal and competent evidence; and (3) failure of the government to prove all of the essential elements of the counts chargd. (App. 633, 886). The motions were overruled. (App. 633, 886).

The essence of the government's case is:

1) Agents of the Railroad Commission of the State of Texas entered on the lease without a warrant and conducted a test of production of the two wells on December 1, 2, and 3 of 1969, and found that they produced 1.29 barrels of crude oil during a consecutive period of 24 hours. (App. 173).

2) On January 13, and 14, 1970, agents of the Railroad Commission of the State of Texas, using employees and equipment of Service Pipeline, reentered the lease without a warrant and, using employees and equipment of Service Pipeline, dug around the tanks in search of concealed pipelines and, finding none, took samples of oil from the premises through an agent and representative of Service Pipeline. (App. 183, 184).

3) Expert testimony that:

A) The 1,200 barrels of oil in the Wilson tank

were about six months old compared to hearsay fresh oil from adjoining leases (App. 465-468);

B) That oil had not flowed through the Stentz valve on the Wilson lease for six months or more, based upon photographs and comparisons of the Stentz valve on the Wilson premises and the Stentz valve on other leases in the area (App. 491).

C) That the Wells on the Wilson lease were incapable of producing the amount of oil represented based on a comparison with the production of crude oil from wells on adjoining leases and in the area. (App. 493-496).

Pre-trial Motion (App. 28-33)

Petitioners moved the Court to suppress and prohibit introduction into evidence by the government of the following:

1) All evidence relating to or based upon the search or seizure of property from the Wilson premises;

2) Oil samples or other property taken from the Wilson premises, the result of any and all tests thereon, and opinions based upon such property, tests, and entry upon the Wilson premises;

3) Opinions as to age of oil based upon comparison tests of oil from the Wilson premises with oil from other leases;

4) Evidence pertaining to the capacity of production from the Wilson lease based on production of other wells not shown to be comparable.

Petitioners contended:

1) That the two entries by the agents of the Railroad

Commission of the State of Texas constituted unlawful and unreasonable search and seizure in violation of petitioners' rights under the Fourth Amendment to the Constitution of the United States and Rule 41 of the Rules of Criminal Procedure of the United States;

2) That the amount of production and oil samples from other wells in the same field were not admissible for comparison purposes with the Wilson well without a showing of comparability.

Upon the hearing of the motion to suppress, the government admitted that the taking of oil samples from the lease was done with the permission of the agent in charge of the Railroad Commission (Suppl. App. 20), and that the digging around the tanks was state action. (Suppl. App. 22). Service Pipeline asked the Railroad Commission to conduct the test because they believed a crime had been committed (Suppl. App. 23), and because they felt that they were being defrauded. (Suppl. App. 24). The government contended that the Railroad Commission did not search or seize anything, but the Trial Court said:

"I can't agree with you on that." (Suppl. App. 24).

The motion to suppress by the petitioners included the suppression of all evidence pertaining to the test conducted by the Railroad Commission on December 1, 2, and 3 of 1969 (Suppl. App. 29).

The Trial Court held:

". . . The search and seizure of these was a lawful search by the state officials . . ." (Suppl. App. 30).

Holding By Court of Appeals, Re: Search and Seizure

The Court of Appeals for the Fifth Circuit held that the Railroad Commission of the State of Texas had the

power to enter the lease for inspection purposes under Rule Two, and that the production tests were made within the realm of its authority, and the tests were, therefore, admissible; however, the Court held that the taking of the oil samples and the Stentz valve by the investigator of Pan American, while the digging by the Railroad Commission was in process, are not within the exclusionary rule of the Fourth Amendment since its application is limited to actions of the state or federal government and not to acts of private individuals.

The Second Search and Seizure, Private or State?

The entry and search began with the letter of Will Edd Parker, District Director of the Railroad Commission, to Mr. Charles R. Wilson, reading as follows:

"Dear Sir:

Pursuant to an order of the Commission, I am directed to make a complete investigation of these properties to search for and find any disclosed pipe lines that might exist on this lease. The work is being done by the Commission and all personnel will be under my supervision and controlled by me.

This investigation will start at 9:00 a.m., January 13th, 1970. Your cooperation in this matter will be appreciated.

Yours very truly
Will Edd Parker,
District Director."

(App. 177).

Mr. Parker testified that everything was done under his direction and control at the direction of Mr. Payne in Austin, and that he was told by Mr. Payne to use Service Pipe-

line's personnel (App. 180-181); that the security agent was under his direction and control and that if he took any samples it was with his consent (App. 183); that there was no formal order from the Railroad Commission for the entries, tests, and samples (App. 202). The security agent taking the Stentz valve and oil samples from the Wilson lease testified as follows:

" Q All right. And did you personally take the samples?

A Yes, sir, I did.

Q Did you obtain permission from anyone to obtain these samples:

A I asked Mr. Parker, who was in charge of the Railroad Commission at the time, if I could take the samples.

Q Did he give you permission to take the samples?

A Yes, sir, he did.

Q Did you have any conversation with Mr. Wilson?

A Yes, sir, I did.

Q Did you identify yourself?

A Mr. Wilson asked me who I was, I identified myself to Mr. Wilson.

(360)Q And did Mr. Wilson say anything in regard to what you could do on the lease?

A Yes, sir. He told me I could do anything I cared to do on the lease." (App. 400)

Harmless Error

The panel held that all evidence pertaining to the Hudman tank samples were improperly admitted, but that the error was harmless, stating that the age of the Wilson oil,

not the age of the Hudman oil, was the critical issue. The expert witness determined the critical issue of the age of the Wilson oil by making four tests on the Wilson samples and the Hudman samples: gravity, viscosity, evaporation, and distillation. (App. 453, 454). The expert used the hearsay information on the Hudman labels to determine the age of the Hudman oil and the place where the samples were taken and, using this assumed known age and comparing the results of his tests, arrived at his conclusion as to the age of the Wilson oil. The labels on the Hudman samples were placed thereon by persons unknown and who did not testify. He concluded from his tests that the Wilson oil was three or four times as old as the Hudman oil of the assumed known age, making the Wilson oil about six months old. (App. 457-469). The Court's opinion does not explain why the expert's opinion testimony based thereon should not have, likewise, been inadmissible.

Circumstantial Evidence

Defendants prepared and presented to the Court for submission to the jury a charge on circumstantial evidence, which was refused. (App. Vol. I, pages 38, 39).

Upon trial, prosecution witness A. W. Gibson admitted (App., Vol. I, pages 376-379) that determination of whether or not oil was actually being pumped from the tanks on the Wilson lease into the lines of Service Pipeline Company could have been determined by Mr. Gibson going with Knox when he started a tank and when he turned it off, (page 376), or he could have replaced Knox with another gauger, taking Knox completely off run checking on the Wilson lease, but that neither of these things was done.

Defendant Knox testified (App., Vol. II, pages 852-857) that it could have been positively determined whether or

not Service Pipeline Company actually received oil into its lines from tanks on the Wilson lease, irrespective of how oil got into the Wilson tanks, by any one of the following methods:

1) They could have come up on him at any time and found out whether he was out of order in any way.

2) They could have checked the Stentz valve, just as Mr. Knox did.

3) They could have gone with him and observed his work and measurements.

4) They could have gone behind him and checked his measurements when he turned the tanks off.

5) They could have used a substitute gauger.

6) They could have observed him from a distance.

7) They could have put blind flanges in the lines.

8) They could have put a meter or automatic custody transfer, just like a water meter, on one of the lines.

Witness Floyd W. Duncan, relief gauger and pipeliner for Amoco Pipeline Company, testified that he and a Mr. Bob Compton went on the premises of the Wilson lease and repaired the Stentz valve in question in the fall of 1969, during cool weather, (App., Vol. II, pages 643, 644), noticed oil in the Stentz valve when it was pulled apart, oil ran out and onto the ground making the ground around there messy with oil. (pages 649, 650).

The Court instructed the jury on circumstantial evidence as follows: (App., Vol. I, page 52)

"The law makes no distinction between direct and circumstantial evidence. It requires only that the jury be

convinced of a defendant's guilt beyond a reasonable doubt from all the evidence in the case."

Further, page 59:

"Intent may be proved by circumstantial evidence. Indeed, it rarely can be established by any other means."

App., Vol. I., pages 60, 61:

"In order to constitute the fraudulent offenses charged in this indictment, it is not necessary to show that the accused intended to defraud every person with whom he might have had dealings or that the entire course of the transaction was a fraud. Nor is it necessary to show or prove that the fraudulent scheme or artifice was developed at a particular time.

"With respect to several features of the scheme to defraud described in the indictment, you are instructed that it is not necessary that all the allegations of the scheme be proved; it is only necessary for the Government to prove beyond a reasonable doubt that at least some of the false pretenses, representations or promises therein charged were actually made. A scheme to defraud may be effected by only one material misrepresentation although more are charged. A scheme to defraud may also be effected by concealment of any one material fact although more are charged. It is necessary to prove only a sufficient number of the material representations or omissions to show to your satisfaction, beyond a reasonable doubt that the scheme to defraud charged in the indictment actually existed."

Private Search

The production from the Wilson lease was questioned by Service Pipeline in September, 1968, and on September 23,

1968, and Mr. Pansze, a former agent in the Federal Bureau of Investigation, began his investigation on September 23, 1968. He was then on the security staff of American Oil Company. He testified over the objection of petitioners of his entry on the leasehold after midnight on two nights for the purpose of gauging the tanks after he had had keys made to the locks on two of the tanks. (App. 379-383). Petitioners objected because of the illegal entry and because the evidence was obtained by way of theft, burglary, or other criminal activity in such a manner as to constitute illegal evidence obtained in violation of appellants' right to trial by due process of law. (App. 384).

Business Records

The trial court permitted the introduction of run tickets from other wells in the area as business records of the pipeline company (App. 292), and they were offered to show the truth as to the date of the last run on oil through the Stentz valves on such other leases (App. 294). Appellants objected because the same was irrelevant, immaterial, and denied the appellants the right of cross-examination and right of confrontation with the persons actually preparing such run tickets, (App. 295) and called the attention of the Court to the fact that both of the gaugers signing such run tickets were present (App. 297).

The Court permitted as business records of George R. Brown Oil Company ledger sheets showing the production from other leases other than the Wilson lease in the area (App. 415-18), and records showing the depths of such wells, and as producing from the San Andres formation (App. 418-20), over appellants' objections as to the irrelevancy and immateriality of the same, no showing of a basis for comparability, and as being hearsay, and constituting a

denial of the right of confrontation with the person gathering and submitting such information since it appeared that the entries were made by a bookkeeper without any personal knowledge of the facts, and without any showing that the expert referred to or relied upon such records.

The Court permitted the introduction, as business records, over appellants' objections, of the run tickets from the records of Service Pipeline Company on wells other than the Wilson lease (App. 438). Appellants objected (App. 445), and such objections were overruled (App. 446). The objection was that the information contained therein relative to production was hearsay, denial of right of cross-examination and confrontation, and no showing of a basis for comparability.

The government's expert witness, Ray Amstutz, used the records of Pan-American Pipeline Company, Exhibits "4N-R" (App. 316) to establish the time that oil was last purportedly run through the Stentz valves on adjoining leases (App. 478). He used the Pan-American records of production on the adjoining leases to determine the amount of oil produced from other wells in the vicinity. (Suppl. App. 493). He gave his opinions and conclusions based on these records. (App. 494-496).

Amstutz never testified that the records introduced in evidence by the government were the same records that he studied at the pipeline office.

Comparability

Mr. Moreland, the government's witness, testified that there were 480 wells in the Garza field (App. 431); that the mere fact that two wells produced from San Andres formation does not mean that they will produce the same; (App. 432-433); that the amount of production depends upon the formation, permeability, porosity, type of treat-

nt, equipment, acidization, sand frac, size of tubing pp. 433); type of pumping, rate of removal of fluid, ckness of pay, pinching out of formation, depth to top pay and bottom of pay (App. 434-435); and density wells (App. 441, 442). The Wilson wells were on 20 acre cing while the comparable wells varied from one-half e to two acres, generally. By business records it was ved that all wells were in the San Andres formation. ere was no proof as to allowables. There was no evidence ered by the government as to the age, usage, model num-, date of manufacture, or history of the Stentz valves. ere was no evidence to show a basis for comparability he Stentz valves.

The expert for the government, Ray Amstutz, used the ords of production from Service Pipeline Company to ermine the production on the Wilson lease and the ad-ing leases. (App. 602, 606). He had no knowledge of and history of the Stentz valve on the Wilson lease or other leases. (App. 615). His calculations on age of oil on the Wilson lease was based upon run tickets and ormation furnished by someone else (App. 529, 530). only basis for the comparability of oil and production that the wells were adjoining or nearby. The expert not testify to any knowledge of the amount of the mation, permeability, porosity, type of treatment, type equipment used, acidization, sand frac, or other proce-es with reference to any of the wells, size of tubing, type of pumping, rate of removal of fluid, thickness the pay, or allowable of the Wilson or any other wells.

VI. BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

The trial court had jurisdiction by virtue of an indict-

ment returned alledging violation of Title 18, United States Code, Sec. 1341.

VII. SUMMARY OF REASONS FOR GRANTING WRIT

1) Evidence of the production test by the Railroad Commission agents should not have been admitted since the same was obtained as a result of a search and seizure without a warrant by state officials pursuant to Rule Two of the Railroad Commission which provides for entry and testing for conservation purposes and does not set up any standards whereby the owner's rights under the Fourth and Fourteenth Amendments are protected.

2) The second entry and search and seizure by the Railroad Commission was a state action, and the taking of oil samples and other properties from the lease by the security agent of the oil company, with the knowledge and consent of the state officers who were still acting pursuant to Rule Two and without a warrant, likewise constituted state action, and the evidence obtained as a result of this search was inadmissible, together with all opinions of the expert based thereon.

3) The oil samples from the Hudman lease were held to be inadmissible by the Court of Appeals. The expert used the Hudman samples with the assumed age and place of taking as the basis for expressing his opinion as to the age of the Wilson oil. Thus, the expert's opinion as to the age of the Wilson oil was, likewise, improperly admitted. This combination of evidence was not harmless, and, being an essential link to the government's case, demands reversal.

4) The petitioners' motions for judgment of acquittal should have been granted since:

a) If the government's evidence based on unlawful searches and seizures and improper admission and comparison with the Hudman samples is stricken, the evidence is insufficient to support a finding of guilt beyond a reasonable doubt of either of the defendants.

b) Even if such evidence were proper, the government failed to prove an essential element of its charge that the oil company did not receive the oil, or that it was short any oil, by any witness from the oil company; and the circumstantial evidence in this case is insufficient to establish non-delivery.

5) The Federal Business Records Act is unconstitutional if construed to mean in a criminal case that the same can be admitted to prove facts upon the testimony of the custodian who neither prepared such records or furnished the information contained in such records.

6) As a matter of law, the opinion evidence as to the amount of production of the Wilson wells, based upon a comparison of production from adjoining and nearby wells, was improperly admitted since there was no legally sufficient evidence of comparability.

7) Evidence obtained by an unlawful search by a security officer of the oil company was admitted in evidence contrary to the petitioners' rights under the Fourth and Fourteenth Amendments to the Constitution.

8) All of the above, singularly or in combination, deprived petitioners of their right to a fair and impartial trial by due process of law.

VIII. REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals held that under Rule Two, *supra*, the Railroad Commission agents had the authority to enter

into the lease for inspection purposes; that the production test was made within the realm of its authority; and the test results were therefore admissible, relying on *L & G Oil* v. *Railroad Commission of Texas,* 368 S.W.2d 187 (Tex. 1963), *Trapp* v. *Shell Oil Co.,* 145 Tex. 323, 198 S.W.2d 424 (1946). Both of the cases cited are civil cases decided by a state court. The first dealt with the authority by the Commission under Rule Fifty-Four to order a survey by an outsider, and the Court specifically held that it was not a proceeding to penalize L & G; that L & G was charged with no offense; that the survey was merely a preliminray step and that enforcement of the Rules would be considered later, and that the outsider, in his employment, would act as an agent of the Railroad Commission. (368 S.W.2d 193, 195). *Trapp* v. *Shell Oil Co., supra,* dealt with an exception granted to Spacing Rule Thirty-Seven by the Railroad Commission. We find no language in either of these cases which would sustain the holding of this court as to the admissibility of tests made under Rule Two in a criminal prosecution based thereon. The Court of Appeals does not discuss or dispose of our argument that this holding is contrary to the holdings of the Supreme Court in *Elkins* v. *United States,* 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437; *Camara* v. *Municipal Court of the City of San Francisco,* 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727; *See* v. *City of Seattle,* 387 U.S. 541, 18 L.Ed.2d 943, 87 S.Ct. 1737; and *Colonnade Catering Corp.* v. *United States,* 387 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970).

In *Elkins* v. *United States, supra,* Mr. Justice Stewart said:

> "In determining whether there has been an unreasonable search and seizure by state officers, a Federal Court must make an independent inquiry, whether or not there has

been such an inquiry by a State Court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one State Court may have countenanced, nor diminished by what another may have colorably suppressed."

The Court of Appeals' opinion relies on civil cases by the Texas Court dealing with different Rules of the Railroad Commission other than the one involved here, and such cases would not even speak to the question of the validity of the search or prosecution under state law much less federel prosecution under federal law.

It would seem certain that a criminal prosecution for the violation of Article 4.13 (Taxation—General), *supra*, based upon a refusal of ingress as provided in Rule Two, could not be sustained under the holdings of this court in *Camara* v. *Municipal Court, supra*, and *See* v. *City of Seattle, supra*. Certainly, it would appear that Rule Two should be considered in light of the holding of this Court in *Colonnade Catering Corp.* v. *United States, supra*, wherein it was stated that where congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. The same rule was applied in *United States* v. *Biswell*, 442 F.2d 1189 (10th Cir., 1971, cert. granted 30 L.Ed.2d 336).

Since the State of Texas has not made proper rules governing the procedure that Railroad Commission agents must follow in connection with the search and inspection of premises as a basis for criminal prosecution, then the rule involved and the statute involved are each unconstitutional, and the protection of the Fourth Amendment and its various restrictive rules should apply to any searches pursuant to such rule or statutory authority.

Thus, we submit that the tests made by the Railroad Commission without a warrant, when there was ample time to obtain one, should not have been admitted under the decisions of this Court just cited, and that the holding of the trial court and the Court of Appeals that such evidence was admissible is contrary to the decisions of this Court. In any event, the purpose of Rule Two was to provide for entry and testing "at any time necessary for conservation regulation" — not to investigate to see if a crime against Service Pipeline had been committed. Hence, if Rule Two were construed to validly authorize entry on leases to inspect and test for conservation regulations, it did not purport to authorize entry and testing to see if a crime had been committed as was admittedly done in this instance without a warrant. See *Chapman* v. *United States*, 365 U.S. 610, 5 L.Ed.2d 828, 833, 81 S.Ct. 776 (1961). Petitioners preserved this error by motion to suppress, a continuing objection to the evidence, motion to strike, and motions for judgment of acquittal at the conclusion of the government's case and at the final conclusion of all evidence.

The Second Search—State or Private?

The second search was admittedly to see if a crime had been committed, and it was admittedly under the control of Railroad Commission agents using Service Pipeline personnel and equipment to assist. In the middle of this search, the security agent for Service Pipelne, with the consent of the agent in charge for the Railroad Commission, took oil samples. The court of Appeals says that this was within the knowledge and consent of Petitioner Wilson. We most respectfully, but strenuously, disagree with this statement by the Court based on the facts submitted, *supra*, including the testimony of the Railroad Commission agents, Parker

and Payne, and Security Agent Huerta's testimony heretofore quoted. It would seem to be apparent that the entry was made by all persons pursuant to the letter of Will Edd Parker, District Director of the Railroad Commission, and Rule Two, and that all persons on the lease from Service Pipeline were under the direction and control of the agent in charge for the Railroad Commission. It would seem to be further apparent that Mr. Huerta sought and obtained permission to take samples from Mr. Parker, and that he never requested, sought, or received the consent of Mr. Wilson to take samples. Petitioner Wilson acted at all times under the direction and order of the letter from Mr. Parker, and the assertion of authority by Mr. Parker in behalf of the Railroad Commission. The search and all entries were upon the basis of this purported authority. The statement of Mr. Wilson, "He told me I could do anything I cared to do on the lease.", does not indicate knowledge or consent to the taking of the property and the removal of the same from the premises. The letter said they would search for hidden pipelines and not take property and remove the same. At most, this could only be considered as acquiescence to a claim of lawful authority to search for hidden pipelines. If considered as "consent," it is similar to that found ineffective in *Bumper* v. *North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.E.d2d 797 (1968), where it is said:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent, was in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. * * * When a law enforcement officer claims authority to search a home under a warrant,

he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion —albeit colorable lawful coercion. Where there is coercion there cannot be consent. At 548-500, 88 S.Ct. at 1792."

Under Sec. 7, Art. 6066a, V.A.T.S. *supra*, it is apparent that the agents of the Railroad Commission are police officers, or the equivalent thereof. *United States* v. *Belcher*, 448 F. 2d 494 (1971, 7th Cir.). Even if they were not police officers, the action of the Railroad Commission agents would, nevertheless, be "state governmental action."

Thus, we submit that under the facts of this case, the taking of the oil samples from the Wilson lease by the security agent for Service Pipeline during the process of the search, and with consent from the governmental agent in charge, was not a private search as held by the Court; but, rather, a search and seizure by governmental action rendering the same in violation of petitioners' rights under the Fourth Amendment, along with the tests of production made upon the occasion of the prior entry without a warrant.

Harmless Error

The Court of Appeals held that all evidence pertaining to the Hudman tank samples (used by the expert in comparison with the samples just mentioned from the Wilson lease) was improperly admitted; therefore, all evidence pertaining to the same should not have been admitted before the jury. The Court further held that this error was harmless. The expert made four tests to determine the age of the oil, and these tests were made on the Wilson samples, taken without a warrant, and the Hudman samples, improperly admitted. The expert's opinion that the Wilson

oil was about six months old was based on these four tests and comparisons assuming a known age of the Hudman oil. The tests of the Wilson oil were meaningless if not compared to the Hudman oil. Without this evidence, the expert's opinion as to the age of the Wilson oil must also fall. Without this evidence as to the age of the Wilson oil, the government's case would have been weakened and petitioners' chances for acquittal would have been strengthened. Certainly this evidence contributed to the verdict and was harmful to petitioners.

Thus, these petitioners stand convicted upon evidence of a production test by state officers without a warrant, and opinion evidence based upon the testing of oil samples taken by state officers without a warrant comparing the same to oil samples from an adjoining well held to be improperly admitted. To allow the trial verdict to stand based on this evidence denies petitioners of their liberty without due process of law.

Business Records

The government added to this the expert's opinion that the Wilson wells could not produce the amount indicated based upon the production of other wells in the vicinity without a showing of comparability, sufficient in law, to make the production of the other wells admissible under the testimony of the government's witness. The records of production of the other wells were admitted under the Business Records Act upon the testimony of the custodian who neither prepared nor had any personal knowledge of the purported facts reflected by such records over the objection of petitioners that they were entitled to have the right of cross-examination and confrontation with the person who prepared such records or had personal knowledge

of the facts reflected in such records. The Court made this holding upon the basis of the *United States* v. *Williams*, 447 F.2d 1285 (1971, 5th Cir., cert. denied 31 L.Ed.2d 231). In the *Williams* case, the question involved expert testimony on valuation of oil and gas properties; and the investigation was in regard to the specific properties involved. Here, the government seeks to use business records of production on extraneous leases with expert testimony based thereon to conclude what the production of the Wilson lease would have been. When you combine the objections of hearsay, denial of right of cross-examination and confrontation and combine this questionable evidence with admittedly improper evidence and evidence obtained by unlawful search and seizure, the entire proceeding demonstrates the basic unfairness of the trial of these petitioners. We submit that the Business Records Act violates the Fourteenth and Sixth Amendments if construed to mean, as the Court of Appeals has held, that you are only entitled to cross examine and be confronted with the custodian of the records who neither prepared the same or had any personal knowledge relative to the facts reflected thereby. Limitations have been made on the admissibility of evidence under this Act. *United States* v. *Burruss*, 418 F.2d 677 (4th Cir., 1969). More than once this Court has intervened to uphold the right of confrontation against exceptions to the hearsay rule. In *California* v. *Green*, 399 U.S. 149, 90 S.Ct. 1930, 1933, 26 L.Ed.2d 489, 495 (1970) this Court said:

> "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more nor less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established

such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)."

This Court has never directly passed on this question although it has denied certiorari in several cases where this question was apparently raised in one form or another. The question should be put to rest, and we respectfully suggest that the clear language of the constitution demands that defendants in criminal cases be granted the trial right to confront both the person preparing business records and the person having personal knowledge of the same.

Corpus Delecti?

The Court of Appeals held that the failure of the trial court to charge that the government had the burden of proving beyond a reasonable doubt (1) that Service Pipeline had shortages of oil equal to or in excess of the shortage from the Wilson lease, and (2) that Service Pipeline did not receive the oil from the Wilson lease as shown on the run tickets, would not be considered by the Court since such instructions were not requested by the petitioners and there was no specific objection by petitioners to the failure of the Court to give such instructions. In oral argument and upon petition for rehearing, the petitioners pointed out that such failure was raised by their motion for judgment of acquittal at the conclusion of the government's case and at the conclusion of all evidence. The claimed error of the trial court in not granting petitioners' motion for judgment of acquittal was preserved and presented on appeal, and

such motion for judgment of acquittal was necessarily a part of petitioners' objections to the Court's charge.

The essence of the government's charge was that Service Pipeline paid for oil they did not receive. The essence of the government's proof was that the wells were incapable of producing this oil. Petitioners contended and still contend that the wells did produce the oil and that the oil was delivered to the pipeline in accordance with the run tickets; however, if Service Pipeline received the oil, it would be immaterial as to whether the oil was producd from these wells or whether it was hauled in or piped in from some other source and delivered into the Service Pipeline gathering system at a point below the Stentz valve or the check valve. Evidently, Service Pipeline thought they were getting the oil or they would not have had the Railroad Commission enter and dig on the lease in search of hidden pipelines.

A shortage by Service Pipeline or failure to deliver on the part of Wilson is the corpus delecti of the offense charged, and proof that the particular two wells could not produce the amount of oil represented to have been delivered (if there is any legal and competent proof to this effect), or that the oil in the Wilson tanks was old (if there is any legal and competent evidence to this effect), would be wholly insufficient to prove that such oil was not received by Service Pipeline by whatever source of production and delivery by Wilson. This being an essential element of the indictment, it must be proved by the government beyond a reasonable doubt. *Johnson* v. *United States*, 244 F.2d 781 (Dist. of Columbia Cir., 1957). There being no proof that Service Pipeline was defrauded or there being insufficient evidence to establish the non-delivery and shortage beyond a reasonable doubt, petitioners motion for judgment of acquittal should have been granted. *United States*

v. *Rabinowitz,* 327 F.2d 62, p. 76 (6th Cir., 1964); *United States* v. *Baren,* 305 F.2d 527, p. 528 (2nd Circ. 1962).

Moreover, since this is a circumstantial evidence case, the inferences reasonably to be drawn from the evidence must not only be consistent with guilt but also inconsistent of every reasonable hypothesis of innocence. *Kolsky* v. *United States,* 5 Cir. 1970, 423 F.2d 1111, 1113; *Hale* v. *United States,* 5 Cir. 1969, 410 F.2d 147, 149 (1969); *Harper* v. *United States,* 5 Cir. 1969, 405 F.2d 185, 186; *Montoya* v. *United States,* 5 Cir. 1968, 402 F.2d 847, 850; *Vick* v. *United States,* 5 Cir. 1954, 216 F.2d 228, 232.

Circumstantial Evidence

Petitioners' motion for judgment of acquittal and the requested instruction on circumstantial evidence each placed in issue the quantum of proof required in a case such as this. The trial court recognized that this was a circumstantial evidence case by the instructions given to the jury as quoted under material facts, *supra.* The Court's charge weakened the requirement of proof beyond a reasonable doubt by the qualifications and special instructions emphasized by the Court in other parts of the charge, some of which are quoted, *supra,* under material facts. This case is a classical example of a case wherein direct evidence could have been obtained. The pipeline company began its investigation more than a year prior to the first Railroad Commission test in December of 1969. The evidence is without dispute that agents of the pipeline company could have definitely ascertained whether or not oil was flowing from the Wilson tanks into the pipeline by any one of many different ways including the simple procedure of putting a meter on the line to measure the amount of oil going from the Wilson tanks into its lines.

It is respectfully urged that the reasonable hypothesis test is applicable to this case because:

1) Direct evidence of non-delivery (if there were non-delivery) could have been obtaind by a simple procedure, but was not obtained;

2) The circumstantial evidence admitted (if properly admitted and competent) was not inconsistent with every reasonable hypothesis of the innocence of petitioners, in that the evidence admitted tended to prove only a lack of production in the quantities indicated, but failed to exclude the reasonable hypothesis that delivery could have been effected from other sources.

It is recognized that *Holland* v. *United States* (1954) 348 U.S. 121 held that:

> ". . . The better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect . . ."

where the government necessarily had to rely on circumstantial evidence to establish proof on income tax evasion. In that case positive and direct evidence was not available and could not have been obtained. The Fifth Circuit, apparently, has not construed the *Holland* case as changing the reasonable hypothesis test for the evaluation by the trial court of the sufficiency of the circumstantial evidence to support a conviction. See *Kolsky* v. *United States, supra,* wherein it is said:

> ". . . Although the 'reasonable hypothesis' test is to be applied by the court in assessing circumstantial evidence, Hale v. United States, supra; Harper v. United States, supra; Montoya v. United States, supra; Vick v. United

States, supra, a specific instruction to the jury relative thereto has been disparaged by the Supreme Court." (Citing *Holland* v. *United States, supra*)

In *Hale* v. *United States, supra*, it is said:

". . . Moreover, since this is a circumstantial evidence case, the inferences reasonably to be drawn from the evidence must not only be consistent with guilt but also inconsistent with every reasonable hypothesis of innocence."

In *Harper* v. *United States, supra,* the Fifth Circuit also said:

"In circumstantial evidence cases, such as this, '. . . the test to be applied on motion for judgment of acquittal and on review of denial of such motion is not simply whether in the opinion of the trial judge or the appellate court the evidence fails to exclude every reasonable hypothesis, but that of guilt, but rather whether the jury might reasonably so conclude.' Vick v. United States, 5th Cir. 1954, 216 F.2d 288."

In *Montoya* v. *United States, supra,* the Fifth Circuit said:

"There is ample cause for suspicion and conjecture in this case, but suspicion and conjecture are not sufficient to sustain a conviction. In our view, the jury was not justified in reaching the verdict of guilty, even though they accepted the government's evidence as true and accorded it full weight. All of the evidence against Montoya is circumstantial. In order to sustain a conviction in circumstantial evidence cases, the inferences to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence."

Therefore it appears that the Fifth Circuit has construed the *Holland* decision to mean that although the reasonable hypothesis instruction need not be given to the jury; nevertheless, its requirements must still be met and the circumstantial evidence must not only be consistent with guilt but also inconsistent with every reasonable hypothesis of innocence. Applying this test to the circumstantial evidence in this case, it is clear that it is not inconsistent with every reasonable hypothesis of innocence in that the evidence only tended to prove non-production or a lesser production than represented and, therefore, non-delivery, whereas, under the reasonable hypothesis test, delivery could have been accomplished even without production from these specific wells. Therefore, under the facts of this case, we submit that if the Fifth Circuit is correctly stating the law since *Holland*, the reasonable hypothesis test is still to be applied by the courts.

Especially, should this be true in a case where direct evidence was available and could have easily been obtained. In 23 C.J.S., p. 561, Notes 16 and 16.5, dealing with the weight and strength of circumstantial evidence as compared with direct evidence, it is stated:

> "It has been held that circumstantial evidence may be sufficient to warrant a conviction, although direct evidence is obtainable or is before the jury; but there are cases to the contrary and it has been said that the law does not look with favor on conviction by circumstantial evidence when direct and positive evidence is obtainable by reasonable diligence."

Evidence Obtained by Unlawful Private Search

Security Agent Pansze was employed by American Oil Company, a subsidiary of Standard of Indiana, as are Amer-

ican Oil Company Pipeline (successor to Service Pipeline) and Pan-American Oil Company. He began his investigation of the production of this lease in September of 1968, more than one year prior to the initial test by the Railroad Commission in December, 1969. Shortly after he began his investigation, he had keys made to the locks on two of the tanks and, in the middle of the night, entered on the premises and measured the amount of oil in the tanks and came back later and measured the tanks, again in the middle of the night. Admittedly, he had no right as a private citizen or as a security agent for the oil company to do these things; however, since this was long before federal or state officers intervened, the Court held that this evidence was admissible under *Burdeau* v. *McDowell*, 1921, 256 U.S. 465, 475. The Court of Appeals sustained the trial court in the admission of this evidence upon the same authority.

When this Court did away with the "silver platter" doctrine in *Elkins* v. *United States, supra*, did it intend to eliminate this doctrine completely or just partially? So far, we still have the "silver platter" doctrine as to evidence obtained by illegal, private search. So far, this Court has denied certiorari in cases raising this question since the decision in *Elkins*. e.g. *People of New York* v. *Horman* (New York Crt. of Appeals, 1968) 239 N.E.2d 625, 36 A.L.R.3d 547, cert. den. 393 U.S. 1057, 21 L.Ed.2d 699, 89 S.Ct. 698. This case is the subject of an extensive annotation (36 A.L.R.3d 553-601). This annotation points out that the rule is still intact, although it has been criticized in several cases. The rationale for the continuance of the admissibility of the evidence is that exclusion of the same would serve no useful purpose when applied to unlawful private searches. We believe that this rationale breaks down in connection with a case such as this involving evidence obtained by a security officer of a large corporation who

acted for the very purpose of obtaining evidence of a crime and with professional knowledge and skill.

We have in our modern society private police forces, such as the one of Standard of Indiana involved herein, which are larger than the police force of small cities, such as Post, Texas, and the sheriff's office of Garza County, Texas, where this took place. Certainly, if this Court announced the rule that evidence obtained by private persons or private investigators or security officers in an illegal manner would no longer be countenanced in the Federal Courts, the new rule announced would have a deterrent effect upon the unlawful actions of such private policemen in seeking such evidence. Certainly, our modern society demands such a rule of exclusion. Due process of law to these petitioners requires such a rule for their protection against the combined police activities of the security force of Standard of Indiana and the Railroad Commission of Texas.

With the size of private police forces increasing, along with the complexities of society, this Court will eventually be compelled to intervene on this question if we are to have an orderly society. We have progressed far enough in the field of criminal detection and apprehension to be able to apprehend and convict a true criminal without violation of the individual's constitutional rights to due process and freedom from unlawful search and seizure by the gaining of evidence in an illegal, unlawful and unconstitutional manner by any person, private or governmental. We have reached the point in society where we should not encourage or leave open the invitation to a private citizen to violate the law or invade another person's constitutional rights in trying to obtain incriminating evidence against such person. If *Burdeau* v. *McDowell, supra,* is still the law of the land, then we submit that the time is ripe for a change. The Supreme Court in supervising justice in our Federal Courts

should no longer condone, acquiesce in, or invite private citizens or policemen to seek criminal evidence by unlawful and unconstitutional means against their fellow citizen.

CONCLUSION

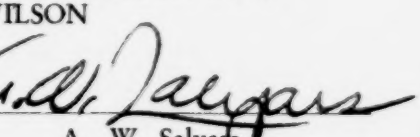
WHEREFORE, premises considered, petitioners respectfully pray that this Honorable Court grant this, their petition for certiorari to the Fifth Circuit Court of Appeals, and that upon a hearing that this cause be reversed and dismissed and, in the alternative, reversed and remanded for a new trial on all counts.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS,
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CHARLES R. WILSON a/k/a
C. R. WILSON

BY: 
A. W. Salyars

CERTIFICATE OF SERVICE

This is to certify that three (3) copies of this petition have been served upon the Honorable Erwin N. Griswold, Solicter General of the United States, by depositing the same in the United States Post Office with air mail, first class postage prepaid. Three (3) copies of this petition have been delivered to the office of Mr. Willis T. Taylor, Assistant United States Attorney, Room C-201, United States Courthouse, Lubbock, Texas 79401, attorney for appellee.

Dated this 16 day of May, 1972.

A. W. Salyars

Appendix A

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2233

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM CROMER KNOX and
CHARLES R. WILSON, a/k/a C. R. WILSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

(March 14, 1972)

Before BELL, DYER and CLARK,
Circuit Judges.

DYER, Circuit Judge: This is an appeal from judgments entered upon a jury verdict of guilty under a ten count indictment. Nine counts of the indictment charged mail fraud,[1] and the remaining count charged conspiracy

[1] 18 U.S.C.A. No. 1341.
[2] 18 U.S.C.A. No. 371.

to defraud.[2] Each defendant was found guilty of each count in which he was named.[3] We affirm.

Wilson is the owner of a royalty and the working interest of two wells located upon land which he owns. The oil from these wells was sold to Pan American Petroleum Company and was transported from the Wilson lease by a pipeline gathering system owned and operated by Service Pipeline Company. Knox was employed by Service Pipeline as a gauger to determine how much oil was being produced by the Wilson wells and thus how much oil entered the pipeline gathering system to be purchased by Pan American. Knox filled out run tickets showing the amount of oil produced from each of the two Wilson tanks and mailed them to Pan American. It then issued its checks in payment for the oil supposedly delivered to it by the pipeline system and mailed them to Wilson. During a five-year period, based upon the run tickets prepared by Knox, Wilson received from Pan American a total of $97,885.32 in payment of oil allegedly produced by his lease. The total barrels of oil per well were shown to have increased each year.

Based upon oil samples from the Wilson lease, the condition of the check and Stentz valve, and production figures from comparable wells, there was expert testimony that no such increased production took place. On the contrary, the pipe connections on the Wilson lease showed no oil in them for up to a year, and the Stentz valve had not been used for more than a year.

The defendants first argue that it was reversible error for the court to fail to charge that the government had

[2]Wilson was named in counts 1 through 10. Knox was named in counts 1, 2, 3, 5, 7, 9 and 10.

the burden of proving beyond a reasonable doubt (1) that Service Pipeline had shortages of oil equal to or in excess of the shortages from the Wilson lease, and (2) that Service Pipeline did not receive oil from the Wilson lease as shown on the run tickets. The short answer to this is that these instructions were not requested by the defendants, nor did they object to the failure of the court to give such instructions. We will not notice matters which were not presented to the district court except to prevent a miscarriage of justice. Fed.R.Crim.P. 30; *United States v. Hall,* 5 Cir. 1971, 440 F.2d 1277, 1278; *Anderson v. United States,* 5 Cir. 1968, 391 F.2d 243, 244.

We are also unpersuaded that the court erred in refusing to specifically charge the reasonable hypothesis test of circumstantial evidence as requested by the defendants. The charge given clearly and adequately instructed the jury on reasonable doubt in a circumstantial evidence case. *Holland v. United States,* 1954, 348 U.S. 121, 139-140; *Kolsky v. United States,* 5 Cir. 1970, 423 F.2d 1111, 1113. Likewise the requested affirmative charge on a scheme to defraud was properly refused. The charge given covered the substance of the requested charge. It is not error to refuse to give the exact charge requested. *Posey v. United States,* 5 Cir. 1969, 416 F.2d 545, 555, *cert. denied,* 397 U.S. 946; *Tillman v. United States,* 5 Cir. 1969, 406 F.2d 930, 940, vacated in part 395 U.S. 830.

Next the defendants assert that it was error for the court to deny their motion to suppress (1) oil samples from the Wilson lease because they were obtained by an illegal search and seizure, and (2) comparison tests of the Wilson wells with other comparable wells because the Federal Business Records Act is unconstitutional if the defendants are denied

the right of cross-examination and confrontation of either the person who has personal knowledge of the evidence, or who prepared the records relied upon.

We consider these contentions in inverse order. The Government's expert based his opinions concerning the production of the Wilson wells in comparison to other wells on original production records of all the leases which had been previously introduced through the individual custodians of each of the records. This not only fully met, but went beyond the test of admissibility that we approved in *United States v Williams*, 5 cir. 1971, 447 F.2d 1285 (en banc).

The defendant's argument that the oil samples and the Stentz valve from the Wilson lease were obtained as the result of an illegal search and seizure is based upon two entries on the Wilson's lease made by representatives of the Railroad Commission of the State of Texas to conduct a production test, the results of which were introduced in evidence, and the Commission's excavation of the pipeline around the Wilson wells to ascertain whether there were any undisclosed pipelines. None were found. It is also contended that, prior to the digging, an investigator for Pan American had keys made for the locks on the tanks and without Wilson's knowledge gauged the tanks for a seven day period. The amount of the increased inventory was admitted in evidence. During the digging by the Railroad Commission a security agent for American Oil Company, with the knowledge and consent of Wilson, took samples of oil from the pipelines and tanks. He also had the Stentz valve removed. The valve and oil samples were sent to an independent laboratory to determine the age of the oil and when oil had last been run through the valve. The results of these tests were admitted in evidence.

We have no doubt that the railroad Commission of the State of Texas has the power, under its ruling making authority, to enter into a lease for inspection purposes.[4] *Cf. L. & G Oil v. Railroad Commission of Texas,* 368 S.W.2d 187 (Tex. 1963), *Trapp v. Shell Oil Company,* 145 Tex 323, 198 S.W.2d 424 (1946). It is quite apparent that Service Pipeline and Pan American were properly concerned about the ever increasing production figures from the Wilson lease and accordingly made a complaint to the Commission. The Commission made an investigation as it was authorized and required to do. The production tests were made within the realm of its authority and the test results were therefore admissible.

The evidence resulting from the gauging of the Wilson tanks by the investigator of Pan American, and the oil samples and the Stentz valve removed by the investigator of American Oil while the digging by the Railroad Commission was in process, are clearly not within the exclusionary rule of the fourth amendment since its application is limited to the actions of the state or federal government and not to acts of private individuals, *Burdeau v. McDowell,* 1921, 256 U.S. 465, 475; *Watson v. United States,* 5 Cir. 1968, 391 F.2d 927, 928, *cert. denied,* 393 U.S. 985; *United States*

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[4](A) The Commission or its representative shall have access to come upon any lease or property operated or controlled by a producer or transporter of oil or gas and to inspect any and all leases, properties and wells. All information obtained by Commission representatives shall be considered official and confidential information and shall be reported only to the Commission.

(B) Designated agents of the Commission are authorized to make any tests on any well at any time necessary to conservation regulation, and the owner of such well is hereby directed to do all things that may be required of him by the Commissioner's agent to make such tests in a proper manner.

v. McGuire, 2 Cir. 1967, 381 F.2d 306, 312-13, *cert. denied* 389 U.S. 1053; *Barnes v. United States*, 5 Cir. 1967, 373 F.2d 517, 518.

The defendants next object to testimony offered by the Government expert witness that oil samples taken from the adjoining Hudman lease showed fresh oil as compared with old Wilson oil. The person who took the sample from the Hudman tank was never identified by the Government. The expert simply used the label on the sample to identify it as Hudman oil. The objection was well taken for lack of proper identification of the sample, but the error was harmless. The age of the Wilson oil, not the age of the Hudman oil, was the critical issue. The evidence that the Wilson oil was old is overwhelming.

> An error that might be preujdicial in a close case does not require reversal when evidence of the defendant's guilt is strong. United States v. Lipscomb, 5 Cir. 1970, 325 F.2d 795, 803, cert. denied, 401 U.S. 980; United States v. Panczko, 7 Cir. 1970, 429 F.2d 683, 688.
>
> Considering the evidence as a whole we are "sure that the error did not influence the jury." Kotteakos v. United States, 1946, 328 U.S. 750, 764. Fed.R.Crim.P. 52(a)

United States v. William Jimmy Roland, 5 Cir. 1971, 449 F.2d 1281, 1282.

Finally, the defendants urge that the court erred in denying their motions for acquittal based upon the insufficiency of evidence to take the case to the jury. We

disagree. On a motion for judgment of acquittal the test is whether, taking the view most favorable to the Government, a reasonably-minded jury might accept the relevant evidence as adequate to support a conclusion of the defendant's guilt beyond a reasonable doubt. *United States v. John Louis Crane*, 5 Cir. 1971, 445 F.2d 509, 520; *Sanders v. Buschkotter v. United States*, 5 Cir. 1969, 416 F.2d 194, 196. *cert. denied*, 397 U.S. 952; *Jones v. United States*, 5 Cir. 1968, 391 F.2d 273, 274. The district court properly submitted the case to the jury. Appellants' other contentions are without merit. There the matter ends.

AFFIRMED.

Appendix B

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2233

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM CROMER KNOX and
CHARLES R. WILSON, a/k/a C. R. WILSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 14, 1972, 5 Cir., 1972, ____ F.2d ____).

(April 19, 1972)

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Appendix C

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2233

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM CROMER KNOX and
CHARLES R. WILSON, a/k/a C. R. WILSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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ORDER:

IT IS ORDERED that the motion of appellants *William Cromer Knox and Charles R. Wilson, etc.*, filed in the above styled and numbered cause for a stay of the issuance of the mandate pending their petition for writ of certiorari in this cause be, and the same is hereby DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1500

WILLIAM CROMER KNOX AND CHARLES R. WILSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is at 458 F. 2d 612.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1972, and petitions for rehearing and for rehearing *en banc* were denied on April 19, 1972 (Pet. App. B). The petition for a writ of certiorari was filed on May 17, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether agents of the Texas Railroad Commission, acting pursuant to a Commission Rule authorizing representatives of the Commission to go upon any oil-producing lease for inspection purposes and to make tests necessary to conservation regulation on any well at any time, properly entered onto a lease without a search warrant for the purpose of conducting production potential tests of the wells.

2. Whether the removal of oil samples from the lease, with the permission of a Commission representative, by an employee of a private company whom the owner had authorized to do anything he cared to on the lease, violated the owner's Fourth Amendment rights.

3. Whether evidence obtained by a private trespass in which no state or federal agent had participated was admissible.

4. Whether the court of appeals properly held that the admission of certain evidence, involving no constitutional issue, had been harmless error.

5. Whether the Federal Business Records Act (28 U.S.C. 1732) unconstitutionally denies to the accused in a criminal case his right to be confronted by the witnesses against him.

6. Whether the evidence is sufficient to support petitioners' mail fraud convictions.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of using the mails to defraud and of conspiring so to do, in violation of 18 U.S.C. 1341 and

371 (R. 7–19, 71–73).[1] On June 9, 1971, each was sentenced to three years' imprisonment (R. 83–86).[2] The court of appeals affirmed (Pet. App. A).

1. Petitioner Wilson is the owner of a royalty and the working interest in two oil wells located upon land which he owns in Garza County, Texas. The oil from the wells was sold to Pan American Petroleum Company ("Pan American") and was transported from the lease by a pipeline gathering system owned and operated by Service Pipeline Company ("Service Pipeline").[3] Petitioner Knox was employed by Service Pipeline as a gauger, whose duty it was to determine how much oil entered the pipeline system from tanks on the lease in which the oil from the wells was stored between runs. Following completion of a run, Knox would fill out run tickets, showing how much oil had flowed into the pipeline, and mail them to Pan American. On the basis of these tickets Pan American would mail Wilson a check for the oil it had supposedly received. The scheme charged by the

[1] "R." refers to the appendix record, in two consecutively paginated volumes. "Supp. R." refers to the one-volume supplemental appendix. Copies of these documents are being lodged herewith.

[2] Petitioner Wilson was convicted on all counts of the ten-count indictment. Petitioner Knox, who was named in all of the counts except substantive counts 4, 6, and 8, was convicted on each of the counts in which he was named. Each petitioner was sentenced to three years' imprisonment on each count, to run concurrently.

[3] Both Pan American and Service Pipeline (which were known at the time of trial as Amoco Production Company and Amoco Pipeline Company, respectively) are wholly owned subsidiaries of Standard Oil Company of Indiana (R. 99–100, 230, 276, 343–344, 366; Supp. R. 4–5).

indictment was one to defraud Pan American through falsification by Knox of the reported quantities of oil released in the runs (Pet. App. A 38; R. 7–19, 101–113, 248, 281–284, 691–692).

During the five-year period, 1964 to 1969, involved in the alleged scheme, Wilson received a total of $97,885 in payment for oil purportedly produced from the lease. According to the run tickets, the amount of oil delivered had increased each year during the period. Based upon oil samples from the lease, the condition of the Stentz and check valves (valves through which the oil was required to flow as it passed from the tanks to the pipelines), and production figures for comparable wells, there was expert testimony that no such increased production had occurred. This evidence included testimony that no oil had flowed through the Stentz valve on the Wilson lease (see *infra*) for more than a year prior to the last run reported in the tickets. The expert witness, Ray Amstutz, testified that the interior of the Stentz valve was dry, rusty, and free of any visible oil, whereas the like valves from adjacent and neighboring leases, which Amstutz had examined following oil runs that had occurred from three days to more than 13 months previously, all showed clearly visible oil traces (Pet. App. A 38; R. 285–288, 479–493, 873).

2. Petitioners' principal contentions relate to the manner in which the government acquired various items of evidence. A chronology of their acquisition may therefore be helpful.

(a) *Rate of tank filling* (*see Point 3, infra*).

In the fall of 1968 after learning that the oil runs from the Wilson lease were reported to be considerably higher than those from other leases in the area, Arthur Pansze, a Pan American investigator, undertook to try to determine what Wilson's wells were producing (R. 343–344, 380–381). Pansze entered onto the lease to see if he could gauge the tanks without petitioners' knowledge, but found that the hatches on two of the four tanks were locked (R. 382). He noted the numbers of the locks, had keys made for them, and in this way was able to gauge the tanks on the nights of October 24 and 31, 1968 (R. 382–383, 389–390). He found that the fluid contents of the tanks had increased by 11.1 barrels over the seven-day period, during which no oil runs to the pipelines had occurred. The amount of the increase was admitted in evidence (R. 389–390, 395, 737). No government official, state or federal, had had any part in these activities.

(b) *Production potential tests* (*see Point 1, infra*).

After Pansze's tests Service Pipeline complained to the Texas Railroad Commission, the state's regulating authority for the oil and gas industry, that it believed that there were irregularities connected with the Wilson lease and that the lease was incapable of producing the amount of oil that was claimed for it (R. 115, 135, 174, 345). Production potential tests were ordered by the Commission and were conducted by it on December 1, 2, and 3, 1969 (R. 135, 172–173). The tests, which were not requested by Service Pipeline, were observed by Service Pipeline and Pan American employees, but no employee of either com-

pany entered onto the lease during them (R. 347–349). The tests, which revealed that the wells together produced 1.29 barrels of oil over the 51-hour period they were in progress (R. 173), were introduced in evidence.

After these tests the Commission issued a severance order prohibiting Wilson from making further deliveries of oil to the pipelines, for the stated reason that he had failed to file proper production reports (R. 139–141).

(c) *Oil samples* (*see Point 2, infra*).

On January 13 and 14, 1970, pursuant to an order of the Director of Field Operations of the Commission, and under the supervision of a Commission official, excavations were conducted on the lease to determine whether undisclosed pipelines led into or out of the premises (R. 115, 177–179, 202, 372). Because the Commission lacked the equipment and personnel for such work, Service Pipeline employees and equipment were used in the project (R. 178, 207). No hidden pipelines were found (R. 178–179). During the digging, in a conversation initiated by Wilson, Wilson told Robert Huerta, a security agent of American Oil Company (an affiliate of Service Pipeline and Pan American), after Huerta had identified himself at Wilson's request, that he could do anything he cared to on the lease (R. 398, 400). Huerta thereafter took oil samples from the tanks and from various locations in the pipeline (R. 400–402). Before doing so, Huerta sought and obtained the permission of Will Edd Parker, the Commission official in charge of the digging project (R. 183, 400). Besides taking the oil

samples, Huerta removed or directed the removal of the Stentz and check valves from the pipeline system (R. 412, 498–499). The valves were the property of Service Pipeline (R. 412).[4] Evidence of tests performed on the oil samples was admitted at petitioners' trial (R. 351–352, 366–367, 402–403, 412–413, 498–506).

No federal authority had had anything to do with any of the foregoing transactions.

ARGUMENT

1. Petitioners contend that the results of the Railroad Commission's production potential tests were inadmissible because the Commission did not obtain a search warrant authorizing it to enter upon the lease (Pet. 19–22). However, Rule Two of the Commission, which was issued pursuant to the rule making authority granted that body by the Texas legislature and has the force and effect of a statute (*L&G Oil Company* v. *Railroad Commission*, 368 S. W. 2d 187, 191, 193 (Tex.); *Trapp* v. *Shell Oil Co.*, 145 Tex. 323, 346, 198 S. W. 2d 424, 439), authorizes agents of the Commission to go upon any lease or property operated or controlled by an oil producer, to inspect any and all leases, properties, and wells, and to make tests necessary to conservation regulation on any well at any time (see Pet. App. A 41 n. 4). The

[4] In addition to owning the valves, Service Pipeline had a contract easement with Wilson's predecessor in interest, binding on Wilson, giving it the right to enter onto the lease at any time in order to "construct, maintain, inspect, operate, protect, repair, replace, * * * or remove" its pipeline (R. 35; Supp. R. 26). The valves were part of the pipeline system. Petitioners make no claim that either valve was improperly seized.

entry and testing involved here came within the scope of this authority. Service Pipeline and Pan American were properly concerned, as the court of appeals noted (Pet. App. A 41), about the ever increasing production figures from the lease. This was also a matter of proper concern to the Commission, even from the strict viewpoint of its conservation authority. Hence when complaint was made to the Commission, it properly undertook to investigate. In light of the specific authority granted it by the Rule, the procuring of a search warrant was unnecessary. Cf. *United States* v. *Biswell*, No. 71–81, O.T., 1971, decided May 15, 1972.[5]

2. Nor is there merit to petitioners' claim that the oil samples were improperly removed from the lease (Pet. 22–24). Wilson told him, according to Huerta (the private employee of American Oil Company who took the samples), that he could do anything he cared to on the lease. Wilson's statement was made after Huerta had identified himself, at Wilson's request, in a conversation which Wilson had initiated. The court of appeals properly concluded in these circumstances that Huerta had acted with Wilson's consent. There is no basis for an inference that Wilson's consent was given either as the result of a mistaken impression on Wilson's part of Huerta's identity or

[5] Moreover, unlike such cases as *Elkins* v. *United States*, 364 U.S. 206, *Camara* v. *Municipal Court*, 387 U.S. 523, and the other cases cited at Pet. 20, each of which involved search of a dwelling or ordinary commercial establishment, the entry here was into relatively open territory, a lease in an oil field. Cf. *Hester* v. *United States*, 265 U.S. 57.

pursuant to a show of authority or implied demand by Huerta.[6] Huerta's testimony was not disputed at the trial and is not challenged here (Pet. 11, 23).

It is immaterial that before taking the samples Huerta also secured the permission of Parker, the Commission official on the scene, who was supervising the excavation operation. The official was properly on the lease in connection with the Commission's ongoing investigation and it was only natural for Huerta to have felt that he should have his permission as well as Wilson's for what he did.

The district court, as petitioners note, in ruling on the pretrial suppression motion, treated the taking of the samples (presumably because of Parker's role in the matter) as "at least in part" Commission—and hence Texas—action and held that the action had been proper in the circumstances (Pet. 9; Supp. R. 26–27). The court of appeals had no occasion to consider the propriety of the taking viewed as an unconsented-to state action because it treated the taking as the private act of Huerta, to which Wilson had in any case consented (Pet. App. A40, 41).

Even if it be assumed, moreover, *arguendo,* that the taking of the samples involved an impropriety attributable to the Commission's representative by reason of his having consented thereto, reversal would

[6] Hence *Bumper* v. *North Carolina*, 391 U.S. 543, relied on by petitioners, is inapposite. There the "consent" relied on by the prosecuting authorities, by a householder to a search of her home following announcement by the officers that they had a search warrant, was, as the Court noted, "no more than acquiescence to a claim of lawful authority" (at 549).

not be required. The only evidence based on the samples was the expert testimony that the oil in them was stale. The sole significance of the evidence was that it tended to show that no oil, or very little, had flowed from the tanks into the pipeline gathering system during the last six months to a year of the pertinent period (cf. Pet. 7–8). That fact, however, was established—wholly independently of the age of the oil—by the expert testimony based on the condition of the Stentz valve. The valve, as noted previously, was Service Pipeline's property, not Wilson's, and no impropriety was involved in its removal. Petitioners, indeed, do not contend otherwise here. Hence even if the testimony based on the oil samples was inadmissible, the error was harmless beyond a reasonable doubt. Cf. *Chapman* v. *California,* 386 U.S. 18, 21–24.

3. Petitioners concede that under *Burdeau* v. *McDowell,* 256 U.S. 465, the evidence which Pansze, Pan American's investigator, obtained through a trespass to which no government agent was a party (*supra,* p. 5) was admissible, but urge that the decision no longer has vitality and should be reexamined (Pet. 32–35). However, the rationale of *Burdeau*—that the Fourth Amendment and its implementing exclusionary rule protect only against official invasions of privacy—has remained unimpaired by the more recent decisions of this Court and the decision has been consistently followed by the courts of appeals. See, *e.g., United States* v. *Winbush,* 428 F. 2d 357, 358–359 (C.A. 6), certiorari denied, 400 U.S. 918; *Watson* v. *United States,* 391 F. 2d 927, 928 (C.A. 5), certiorari denied,

393 U.S. 985; *United States* v. *McGuire*, 381 F. 2d 306, 312–313 (C.A. 2), certiorari denied, 389 U.S. 1053; *Barnes* v. *United States*, 373 F. 2d 517, 518 (C.A. 5); *United States* v. *Goldberg*, 330 F. 2d 30, 35 (C.A. 3), certiorari denied, 377 U.S. 953; cf. *People* v. *Horman*, 22 N.Y. 2d 378, 239 N. E. 2d 625, certiorari denied, 393 U.S. 1057. There is no sound reason why prosecuting authorities should not be able to use probative evidence obtained without governmental wrongdoing.[7]

4. The government's expert witness estimated the average age of the oil in the Wilson tanks at six months, based on a comparison of the samples taken therefrom with a 55-day-old sample of the oil from a tank on an adjacent property known as the Hudman lease (R. 464–469). Because the person who had taken the sample from the Hudman tank was not identified by the government and the expert had simply used the label on the sample to identify it as Hudman oil, the court of appeals held that the admission of the estimate had been error, but that the error had been harmless because it was the age of the Wilson oil,

[7] Even assuming, moreover, *arguendo*, that the challenged evidence was improperly received, the error, here again, was harmless. The substance of the evidence was that the amount of oil in the tanks had increased by only 11.1 barrels within a seven-day period in late 1968—and inferentially that that had been the amount produced by the wells during the period. However, the only significance of the statistic was that it tended to show that little if any oil had flowed into the pipelines from the tanks during the last twelve months or so of the indictment period—a fact independently shown by the expert testimony based on the condition of the Stentz valve (*supra*, p. 4), as well as by other evidence.

not that of the Hudman oil, that was in issue and the evidence that the Wilson oil was old was overwhelming (Pet. App. A 42). Petitioners' challenge of this holding (Pet. 24–25), which involves no search-and-seizure issue or other issue of constitutional dimension, presents no question meriting further review.

5. Petitioners contend that the Federal Business Records Act (28 U.S.C. 1732) unconstitutionally denies to the accused in a criminal case the right to confront and cross-examine the person who made the record and has knowledge of what was recorded (Pet. 25–27). The contention has, however, been uniformly rejected by the courts. See, *e.g.*, *United States* v. *Lipscomb*, 435 F. 2d 795, 802–803 (C.A. 5), certiorari denied, 401 U.S. 980; *Hanley* v. *United States*, 416 F. 2d 1160, 1166–1168 (C.A. 5), certiorari denied, 397 U.S. 910; *United States* v. *Holmes*, 387 F. 2d 781, 784 (C.A. 7), certiorari denied, 391 U.S. 936; *Kay* v. *United States*, 255 F. 2d 476, 480 (C.A. 4), certiorari denied, 358 U.S. 825; cf. *Palmer* v. *Hoffman*, 318 U.S. 109, 111–115; *Dutton* v. *Evans*, 400 U.S. 74, 96 (Harlan, J., concurring in result).

6. Petitioners contend that the evidence is insufficient to support the verdicts because, while the government proved that the wells on the lease were incapable of producing the oil Pan American was being charged for, it failed to prove that oil in the amounts reflected by the run tickets was not delivered to the buyer from another source (Pet. 27–32). There is no merit to the claim. As previously noted, the government proved that little or no oil had flowed through

the Stentz valve, the conduit from the tanks to the pipeline gathering system, for more than a year prior to the last reported run. The substance of petitioners' present suggestion is that oil in the amounts shown on the run tickets might conceivably have been hauled or piped to the lease from sources other than the wells and delivered into the gathering system at a point below the Stentz valve (Pet. 28). However, Wilson testified that the oil represented by the tickets had all come from the tanks (R. 760). Thus the theory of innocence now suggested is contradicted by Wilson's own testimony.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1972.

U.S. GOVERNMENT PRINTING OFFI